STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 17, 2010
v	No. 291217 Genesee Circuit Court
JEFF MATTHEW WASHINGTON, Defendant-Appellee.	LC No. 08-023681-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

The trial court granted defendant's motion to suppress evidence of a handgun found in his vehicle, and dismissed the charges of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The prosecutor now appeals as of right. We reverse.

This Court reviews a trial court's findings of fact from a suppression hearing for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). A factual finding is clearly erroneous "if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). However, "the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *Id*., citing *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), and *People v Oliver*, 464 Mich 184, 191-192; 627 NW2d 297 (2001).

The Fourth Amendment prohibits warrantless searches unless they fall within one of the exceptions described by case law. *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967). See, also, *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Two exceptions are implicated in this case, and both provide grounds for reversal of the trial court's suppression of the evidence of the handgun found in defendant's jacket.

SEARCH INCIDENT TO ARREST

Warrantless searches of vehicles are permitted under what is termed the "search incident to arrest" exception. The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). This exception was applied to the automobile context in *New York v Belton*, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981). Until recently, many courts viewed the Supreme Court's decision in *Belton* as establishing a broad, "bright-line rule," whereby police could search the passenger compartment of an arrestee's automobile incident to any arrest, even after the suspect was secured in a patrol vehicle. See, e.g., *People v Mungo*, 277 Mich App 577, 587; 747 NW2d 875 (2008), vacated 483 Mich 1091 (2009). However, in *Arizona v Gant*, ___ US ___; 129 S Ct 1710; 173 L Ed 2d 485 (2009), the Supreme Court limited *Belton* and clarified that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id*. at 1723. It concluded that a search incident to arrest is unreasonable if neither of these circumstances exists. *Id*. at 1723-1724.

In the instant case, the prosecutor assumes that defendant was actually under arrest at the time the search was conducted. This is not the case. Trooper Williams testified that defendant was arrested for carrying a concealed weapon only after he found the gun, but at the time of the search, defendant was only "in custody" for possession of open intoxicants. Although he suggested that defendant was "technically under arrest" for open intoxicants at the time of the search, the trooper later clarified that defendant was only "detained" for that offense and was not "physically arrested or handcuffed" until he found the gun. Accordingly, the trial court properly found as fact that defendant had not been validly arrested at the time of the search.

A search incident to arrest may still be valid, however, if the arrest follows "quickly on the heels" of the search. *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980). In order for such a search to be valid, probable cause to arrest must exist at the time of the search. *People v Champion*, 452 Mich 92, 116-117; 549 NW2d 849 (1996). However, a warrantless search that provides probable cause to make a subsequent arrest may not be justified as a search incident to that arrest. *Smith v Ohio*, 494 US 541, 543; 110 S Ct 1288; 108 L Ed 2d 464 (1990). In *Smith*, the police officers arrested the defendant on drug charges immediately after discovering drug paraphernalia during a warrantless search effectuated in the course of an investigatory stop. *Id*. at 542. The Court noted that "it is axiomatic that an incident [to arrest] search may not precede an arrest and serve as part of its own justification." *Id*. at 543. Accordingly, the probable cause necessary for the valid search of defendant's car prior to arrest in this case cannot be predicated on his crime of carrying a concealed weapon.

The state trooper did, however, have probable cause to arrest defendant for possession of open intoxicants under MCL 257.624a at the time the search took place. MCL 257.624a states, in pertinent part:

> 1) ... [A] person who is an operator or occupant shall not transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon a highway ... in this state.

It is uncontroverted that defendant possessed the open can of beer while he was the occupant of a motor vehicle. Although Trooper Williams testified that he "might have just cited [defendant] for the open intox and released him" rather than arresting him, subjective intentions of police officers play no role in ordinary probable-cause analysis under the Fourth Amendment guarantee against unreasonable searches and seizures. *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996). It is well established that "[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety." *Virginia v Moore*, 553 US 164; 128 S Ct 1598, 1608; 170 L Ed 559 (2008). See, also, *People v LaBelle*, 478 Mich 891, 892; 732 NW2d 114 (2007) (search incident to arrest was valid where police had probable cause to arrest driver for failure to produce valid license, even though no arrest was actually made). In this case, because the state troopers had probable cause to arrest defendant, the Fourth Amendment permitted them to search defendant to the same extent as if they had effectuated a formal arrest.

Defendant, however, cites *Knowles v Iowa*, 525 US 113; 119 S Ct 484; 142 L Ed 2d 492 (1998), for the premise that a search incident to anything less than a formal arrest violates the Fourth Amendment. In *Knowles*, the defendant was stopped by an Iowa police officer who issued him a citation for speeding. The officer conducted a full search of the car and found drugs under the driver's seat. The defendant was then arrested for possession of controlled substances. *Id*. at 114-115. The defendant moved to suppress the evidence of the drugs found in the car, arguing that the search of the vehicle could not be sustained under the "search incident to arrest" exception, because he had never been arrested. At the time, Iowa state law permitted police officers to conduct a full-blown search of an automobile even without custodial arrest. *Id*. at 115. In its decision, the United States Supreme Court examined the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial," which justify a full search of a vehicle after an arrest. *Id*. at 117. The Court concluded that neither rationale was applicable in the context of a routine traffic stop, and invalidated the search. *Id*.

However, the facts of the instant case do not present a "routine traffic stop" such as that which occurred in *Knowles*. In this case, the troopers testified that they were patrolling an area that was "known to have a lot of drug activity and guns." They observed defendant standing next to a parked vehicle talking to the occupant. Based on their experience, the troopers decided to watch the situation to see if a possible hand-to-hand drug transaction was occurring. The car did not move for several minutes. As the troopers were pulling up, defendant got into the vehicle and started "making a lot of movements with his right arm," "as if he was trying to hide something." Trooper Williams signaled to his partner that defendant was making furtive movements. When defendant was ordered out of the car, he did not immediately comply, but rather, removed his jacket. Given the totality of the circumstances, the situation was not a "routine traffic stop;" rather, it was one tending to implicate the dual justifications for the "search

incident to arrest" exception, (1) the need to disarm the suspect and protect the officers, and (2) the need to preserve evidence of a crime. See *Knowles*, 525 US at 117.[1]

Accordingly, because the troopers had probable cause to arrest defendant for possession of open intoxicants in violation of MCL 257.624a at the time of the search, the fact that defendant was not formally arrested at the time of the search does not alone invalidate the search.

Under *Gant*, a search incident to arrest is only valid "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," *Gant*, 129 S Ct at 1719, or when there is a need to preserve evidence related to the crime of arrest, *Id*. at 1724. In this case, Trooper Williams testified that at the time of the search, defendant was "detained" while "standing beside the car." At the time of the search, defendant was not handcuffed. Thus, defendant was unsecured and within reaching distance of the passenger compartment at the time of the search. Furthermore, the other occupant of the vehicle was still in the driver's seat and was certainly within reach of the jacket. Even based on the narrowed construction of *Belton* as set forth in *Gant*, the search in this case did not violate the protections of the Fourth Amendment, as it was conducted in order to ensure the safety of the troopers.

MICHIGAN V LONG PROTECTIVE SEARCH

Warrantless searches of vehicles are also permitted in some cases outside of the context of an arrest. In *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that a police officer may conduct an investigative stop when an officer has reason to believe that the individual is armed and dangerous. Such a stop, however, cannot be based on an officer's "inchoate and unparticularized suspicion or 'hunch.'" Rather, the officer must be able to point to "specific and articulable facts" which, along with rational inferences, reasonably warrant the intrusion. *Id*. at 21.

The Supreme Court extended the *Terry* protective search for weapons to vehicles in *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). The Court held that a search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and may gain immediate control of weapons. *Id*. at 1049.

The narrowing of the "vehicle search incident to arrest" exception in *Gant* did not affect the validity of the *Long* protective search exception. See *Gant*, 129 S Ct at 1713 (despite

[1] See *Cupp v Murphy*, 412 US 291, 296; 93 S Ct 2000; 36 L Ed 2d 900 (1973) ("Where there is no formal arrest ... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence"). Here, unlike a citizen involved in a routine traffic stop, defendant did take conspicuous and immediate steps to hide evidence of a crime and a weapon that could easily have been accessed and used against the troopers.

narrowing of *Belton*, *Michigan v Long* continues to permit an officer to search a vehicle when safety or evidentiary concerns demand). In fact, Justice Scalia noted in his concurring opinion:

> Where no arrest is made, we have held that officers may search the car if they reasonably believe 'the suspect is dangerous and . . . may gain immediate control of weapons.' *Michigan v Long*, 463 US 1032, 1049; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v Long* is not at issue here. [*Gant*, 129 S Ct at 1724 (Scalia, J., concurring).]

In this case, the trial judge made a factual finding that the officers did not have sufficient, specific, and articulable facts to believe that defendant had or could easily access weapons. However, as noted above, just prior to the search, Trooper Williams personally observed defendant making furtive gestures consistent with trying to conceal something. Trooper Williams asked defendant to show him his hands "a couple of times" and "it was a few seconds before [defendant] actually showed [the trooper] his hands." When Trooper Williams told him to exit the vehicle, defendant took his jacket off and placed it on the front seat before getting out. The trooper specifically testified that he searched the jacket because he believed that defendant was hiding something "that he didn't want me to find." These specific facts are sufficient to support a belief that defendant had or could access weapons.

Although defendant may argue that the trooper admitted he only had a "suspicion" or "hunch" about the vehicle, his testimony in this regard referred only to the troopers' initial impression of the vehicle, a parked car in a high crime and drug area, under circumstances that resembled what the troopers referred to as a hand-to-hand transaction. Once the troopers observed defendant's furtive movements and other suspicious activity, their actions appear to have been based on a reasonable belief that they were in danger.[2]

Despite the lower court's factual findings in the suppression hearing, it appears from the limited record that Trooper Williams did have specific facts to suggest that defendant could have been armed and dangerous. Where we are left with a definite and firm conviction that a mistake was made, a trial court's factual findings will be found clearly erroneous. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

VALIDITY OF THE INITIAL INVESTIGATORY STOP

Defendant's supplemental brief cites additional recent authority and raises one final argument regarding the validity of the investigatory stop at its outset. Although police must have "reasonable suspicion" that a crime may be taking place in order to make an investigatory, or "*Terry*" stop, the level of suspicion necessary "is considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L

[2] Defendant also suggests that there was no danger to the troopers because they were not outnumbered by suspects, as was the case in *Belton*, 453 US at 456. That premise, however, belies the danger of an armed suspect, who could easily endanger more than one officer.

Ed 2d 1 (1989). Reasonable suspicion must be "supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *Id*. at 7.

Defendant relies on *United States v See*, 574 F3d 309 (CA 6, 2009), to suggest that the troopers' action of parking their vehicle in front of defendant's vehicle was an unconstitutional *Terry* stop which invalidated the subsequent search. In *See*, police noticed a car occupied by the defendant and two other men parked in a dark parking lot at 4:30 a.m. *Id*. at 311. The parking lot was located in a high-crime area. *Id*. The officer became suspicious, and parked his patrol car in front of the defendant's vehicle so as to prevent it from moving. *Id*. at 311-312. The ensuing search of the vehicle revealed that the defendant was in possession of a firearm. *Id*. at 312. The Sixth Circuit found that the officer's actions constituted an unlawful *Terry* stop because, based on the totality of the circumstances, the officer lacked reasonable suspicion that criminal activity was occurring. *Id*. at 313-315. Specifically, the court held that being parked in a dimly lit portion of a parking lot late at night in a high-crime area did not raise sufficient reasonable suspicion to conduct a *Terry* stop. *Id*. at 313-314.

The instant case differs from *See*, however. There were no facts in *See* to suggest that the defendant was involved in any illegal activity, rather, he was simply present in a high-crime area at night. *Id*. at 311-312. In the instant case, defendant was described by Trooper Williams as acting in a manner consistent with a "hand-to-hand" drug transaction: defendant was standing next to a vehicle parked at the curb, talking to the driver of the vehicle through the open passenger window for several minutes. Trooper Williams stated that he had made several drug arrests in the area and was familiar with hand-to-hand transactions.

The process of determining the reasonableness of a *Terry* stop allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002). Accordingly, this Court must give deference to the reasonable inferences and deductions made by trained and experienced police officers. *People v Levine*, 461 Mich 172, 185; 600 NW2d 622 (1999). While the evidence that "crime was afoot" in this case was minimal, it was nonetheless objectively reasonable. See *Illinois v Wardlow*, 528 US 119, 123; 120 S Ct 673; 145 L Ed 2d 570 (2000) (only a minimal level of objective justification necessary for valid *Terry* stop). Accordingly, the initial investigatory stop of the vehicle into which defendant had entered was supported by a reasonable suspicion that a crime was occurring.

We reverse the trial court's suppression of the evidence of the firearm found in defendant's jacket. This case is remanded for the purpose of reinstating the Information charging defendant with carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald